

**NO. PD-1319-19**

**IN THE COURT OF CRIMINAL APPEALS OF TEXAS** FILED  
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**CARLOS LOZANO**  
**Defendant/Appellant,**

**v.**

**THE STATE OF TEXAS**  
**Plaintiff/Appellee**

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**FROM THE EIGHTH DISTRICT TEXAS COURT OF APPEALS**  
**CAUSE NUMBER 08-17-00251-CR**

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**BRIEF OF DEFENDANT/APPELLANT**

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Kenneth del Valle  
1062 Whirlaway Drive  
El Paso, Texas 79936  
Tel. 915-276-8353  
Bar No.24010960

## **NAMES OF PARTIES AND COUNSEL**

- |                                  |   |
|----------------------------------|---|
| 1. Judge Presiding               | Hon. Patrick Garcia<br>500 East San Antonio, 10 th Floor<br>El Paso, Texas 79901                              |
| 2. Defendant-Appellant           | Mr. Carlos Lozano<br>No. 02156992<br>Texas Department of Corrections<br>12071 FM 3522<br>Abilene, Texas 79601 |
| 3. Assistant District Attorneys  | Ms. Myrna Pages<br>Mr. Ronald Banerji<br>500 East San Antonio, 2 <sup>nd</sup> Floor<br>El Paso, Texas 79901  |
| 4. Defendant's Trial Counsel     | Mr. Michael Gibson<br>521 Texas Avenue<br>El Paso, Texas 79901  |
| 5. Defendant's Counsel on Appeal | Kenneth del Valle<br>1062 Whirlaway Drive<br>El Paso, Texas 79938   |

/s/ Ken del Valle  
Kenneth del Valle

## **STATEMENT REGARDING ORAL ARGUMENT**

Counsel for Appellant, Mr. Carlos Lozano, does not request oral argument.

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## **STATEMENT OF JURISDICTION**

### **1. BASIS FOR SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT**

This case arose from the prosecution of alleged offenses against the laws of the State of Texas. The District Court therefore had jurisdiction of this case under Tex. Code Crim. Proc. Art. 44.01.

### **II. BASIS FOR JURISDICTION IN THE COURT OF APPEALS 8TH DISTRICT OF TEXAS**

This was a direct appeal from a finding of guilty and sentence imposed upon Carlos Lozano (Lozano) in the 384th District Court of Texas, El Paso County on September 18, 2017 entering a judgment of criminal conviction and imposing a sentence of twenty-five years of imprisonment

Pursuant to Texas R. App. Proc. 25.2 Lozano filed a timely notice of appeal.

Judgment was entered and filed on September 18, 2017 (CR 796), and Motion For a New Trial was filed September 25, 2018 (CR 801). Notice of appeal was filed on December 5, 2017 (CR 811).

On October 31, 2019, in an unpublished opinion, the Eighth Court of Appeals reversed Appellant's conviction and remanded the case for a new trial. *See Lozano v. State*, No. 08-17-00251, 2019 WL 5616975, at 13. (Tex.App. El

Paso Oct. 31, 2019)... petition granted not designated for publication.

Specifically, the Eighth Court held that the trial court's instruction to the jury that Appellant had a general duty to retreat before he could justifiably use deadly force to protect himself against the victim's attack resulted in egregious harm and remanded for re trial.

The State timely filed a motion for rehearing on November 15, 2019.

On December 11, 2019, the Court of Appeals denied the State's motion for rehearing without opinion.

### III. BASIS FOR SUBJECT MATTER JURISDICTION IN THE CRIMINAL COURT OF APPEALS FOR TEXAS

The State timely filed a motion for extension of time to file a petition for discretionary review, which was granted by this Court.

The State timely filed its petition for discretionary review on January 31, 2020. This Court granted the State's PDR on May 6, 2020, with the notation that oral argument will not be permitted.

Accordingly, the Court of Criminal Appeals for Texas Court has jurisdiction over this appeal.



## **STATEMENT OF THE ISSUES**

I. THE COURT GAVE THE JURY TWO INCORRECT JURY INSTRUCTIONS THAT EFFECTED LOZANO'S SUBSTANTIAL RIGHTS AND RESULTED IN EGREGIOUS HARM TO LOZANO.

## STATEMENT OF THE CASE

### A. COURSE AND PROCEEDINGS IN THE COURT BELOW

On January 21, 2016 Lozano was indicted in the 384th District Court of El Paso, County Texas. In the one count Indictment with four parts A, B C, and D (CR 9) – Lozano was charged pursuant to Tex. Penal Code § 19.01 and 19.02 with the murder of Jorge Hinojos (Hinojos) on September 26, 2015.

A jury trial commenced on September 11, 2017 (RR Vol. 6 pg. 4).

The State abandoned parts C and D of the Indictment at the beginning of the trial (RR Vol. 7 pg. 15).

On September 18, 2017 the jury returned a verdict of guilty and the Trial Court entered judgement upon that finding and sentenced Lozano to twenty-five years in the TDCJ. (CR 796)

Lozano filed a Motion For a New Trial on September 25, 2018 (CR 801). The Trial Court did not address the motion and Lozano filed Notice of Appeal on December 5, 2017 (CR 811).

On October 31, 2019 the Court of Appeals 8th District reversed Lozano's conviction and remanded for a new trial in *Lozano v. State*, No. 08-17-00251-CR, 2019 WL 561975 (Tex. App. El Paso Oct. 31, 2019).

The State timely filed a motion for extension of time to file a petition for

discretionary review, which was granted by this Court.

The State timely filed its petition for discretionary review on January 31, 2020. This Court granted the State's PDR on May 6, 2020, with the notation that oral argument will not be permitted.

Accordingly, the Court of Criminal Appeals of Texas has jurisdiction over this appeal.

#### B. STATEMENT OF FACTS.

This summation of facts is taken from the trial testimony of the only three of the State's occurrence witnesses. There were no other occurrence witnesses that testified.

On May 26, 2015 at approximately 2:00 a.m. Carlos Lozano (Lozano) shot and killed Jorge Hinojos (Hinojos). It happened thus:

Several persons were frequenting Pockets, a billiard hall that sold alcohol and food at 4007 North Mesa in El Paso, Texas.

Shortly after 2:00 a.m. the patrons started to leave and a confrontation occurred in the parking lot that led to the shooting.

There were several persons accompanying Hinojos:

Diana Ruiz – Hinojos' girlfriend. (Ruiz) Testified as a State witness – witnessed shooting.

David Torres – Hinojos’ friend. (Torres) Testified as a State witness – witnessed shooting.

Carolina Rocha – Hinojos’ and Rocha’s friend. (Rocha) Testified as a State witness – witnessed shooting.

Carlos LNU – friend of Hinojos. Did not testify.

Chrystyan LNU – friend of Hinojos. Did not testify.

**Diana Ruiz’ testimony starting at (RR Vol. 7 pg. 60).**

Diana Ruiz, Jorge Hinojos and Carolina Rocha got to pockets at approximately 12:00 a.m. in Rocha’s car. (pg. 61). Lozano was already in the pool hall.

Ruiz and her companions left at approximately at 2:00 a. m. and as Carolina Rocha walked towards her car while texting from her cell phone (pg. 88) in the parking lot ... the passenger side of a pick up truck driven by Lozano came close to Rocha and startled her. (pg. 65).

Lozano stopped his truck and Diana Ruiz’ group had words with him about startling Carolina Rocha. Lozano was unresponsive – he just stared at the group. Lozano remained inside of his truck. Lozano lowered the driver’s side window and looked at Carolina Rocha who had continued toward her car by going behind

Lozano's stopped truck and was by then on the driver's side of Lozano's truck.

(pg. 67) At that point Jorge Hinojos, Diana Ruiz, David Torres as well as Chrystyan and Carlos [five persons] were still at the passenger side of the truck.

Lozano's front passenger window was open. Hinojos got mad. (pg. 66).

Jorge Hinojos [standing on the passenger side of the truck] threw a full beer can at Lozano through the open passenger side window. (pg. 66 and 96). Hinojos was mad when he threw the can of beer at Lozano through the open passenger side window of Lozano's truck. (pg. 98).

The beer can thrown by Jorge Hinojos **"exploded inside the truck."** (pg. 67). Diana Ruiz was standing next to Hinojos when Hinojos threw the beer can into Lozano's truck. (pg. 67).

Diana Ruiz pulled Hinojos' arm and urged him to leave but Hinojos said, "No" Then Hinojos went around to the driver's side of the truck and started punching Lozano – Lozano was still in his vehicle at the time. (pg. 67). Diana Ruiz [apparently following Hinojos around to the driver's side] tried to pull Jorge Hinojos away as Hinojos was attacking Lozano when Ruiz heard three shots. (pg. 69).

After Jorge Hinojos threw the full can of beer at Lozano [from the passenger side], Hinojos "... went towards the side where Carlos [Lozano] was, towards his

window, and hit him [Lozano] with his fist.” (pg. 98 and 99). Hinojos hit Lozano the face with a closed fist. (pg. 100).

Hinojos became angry because Carolina Rocha had been frightened by the proximity of Lozano’s truck to Rocha – although by then Rocha had made it to her own vehicle and there was no danger to Rocha. (pg. 100 and 101).

After the three shots Jorge Hinojos fell to the ground and Lozano sped away. (pg. 69). The remaining persons put Hinojos in Carolina Rocha’s car and drove him to a hospital where he died.

On September 26, 2015 Diana Ruiz made a statement to the police that there had been no altercation while inside of the Pockets pool hall. (pg. 91, 92).

**David Torres’ testimony starting at (RR Vol. 7 pg. 106).**

At approximately 12:00 a.m. on the evening of September 25, 2015 David Torres arrived at the Pockets pool hall with two other men – Chrystyan and another man whose name Torres could not at first recall but later remembered as Carlos – not Lozano.(pg. 107 and 108).

Inside of Pockets... Torres, Chrystyan and Carlos joined Diana Ruiz, Carolina Rocha and Jorge Hinojos. (pg. 108). The group was drinking alcoholic beverages. (pg. 109).

The group of six left together shortly after 2:00 a.m. – closing time. (pg. 109).

In the parking lot David Torres saw Lozano's truck running but stopped while Lozano spoke to a woman in a car stopped and also running next to Lozano's truck. Both Lozano and the woman had their windows down as they spoke. (pg. 110). The car and the truck then left. (pg. 111).

The truck [Lozano's] returned and drove through the parking lot. The truck drove too close enough to "the girls" and the girls yelled at Lozano. "Hey, can't you see?" (pg. 109).

Lozano stopped his truck and lowered the passenger side window and spoke to "the girls." Carolina Rocha went behind Lozano's truck towards the driver's side and Lozano lowered his driver's side window to speak with her but Rocha continued walking behind Lozano's truck and went to her own car. (pg. 112).

When Carolina Rocha went to her vehicle Lozano turned to the open passenger side window and looked at Diana Ruiz and Jorge Hinojos got upset because Lozano was looking at his [Hinojo's] girlfriend. (pg. 113).

David Torres approached the truck and told Lozano to leave. He repeated to Lozano to leave because Jorge Hinojos was angry and getting aggressive. As Torres was talking with Lozano... Hinojos threw a beer through the passenger side

window at Lozano. (pg. 113).

At that point Lozano reached to the back seat and grabbed a back pack... put it on the seat next to him... and took out a pistol from the backpack..

Someone yelled, “Hey, he has a gun.” Lozano then pointed the pistol at David Torres and Torres responded, “Hey, what are you going to do with that? You better leave. Don’t scare me with that gun.” (pg. 114).

David Torres continues: “So at that moment Jorge [Hinojos] did not see he [Lozano] took out the gun. And he [Hinojos] went around the truck, and he hit Carlos [Lozano], like two or three times...” (pg. 114).

“At that moment Carlos [Lozano] **turned around** and he shot him on the chest about two or three times.” (pg. 114).

Torres called 911 and provided the operator with the license number of Lozano’s truck. Then several of the group put Jorge Hinojos in Carolina Rocha’s car and drove Hinojos to the hospital. (pg. 115).

On September 16, 2015 Torres told the police that Lozano had been driving through the Pockets parking lot looking for chicks and that Lozano had the window down. (pg. 127).

Torres stated that Lozano never intentionally attempted to run over anyone as Lozano was cruising through the parking lot and further that he [Torres] had



never made such a claim. (pg. 128).

Jorge Hinojos became upset when Lozano was looking at the girls.  
(pg. 130).

David Torres told Lozano to leave. “ That’s when I got close to him... **Hey, there are several of us.** You better leave”. (pg. 130).

Jorge Hinojos threw the beer can at Lozano when Carolina Rocha was already at her car and the incident of the women becoming frightened had passed.  
(pg. 130).

The beer can flew by Torres as it was launched by Hinojos at Lozano.  
(pg. 130).

While David Torres was speaking with Lozano – **Hinojos, Chrystyan and the other Carlos where standing close by.** (pg. 131).

Lozano took out the pistol from his back pack after Jorge Hinojos threw the beer can at Lozano while Lozano was inside of the truck. (pg. 131).

Lozano shot Jorge Hinojos after Hinojos had struck Lozano two or three times. “Yes, Jorge [Hinojos] hit him [Lozano] and then afterwards he [Lozano] shot at him [Hinojos].” (pg. 133).

When Lozano first took out the pistol he pointed it in the direction of the passenger window at David Torres. As Lozano was concentrating on Torres...

Hinojos ran behind the truck and went to the driver's side window. Once Hinojos got to the driver's window and while Lozano was still facing the other way towards Torres – Hinojos began to punch Lozano. **Lozano, still in his vehicle, then turned to Hinojos and shot him.** (pg. 130).

**Carolina Rocha's testimony starting at (RR Vol. 7 pg. 147).**

Carolina Rocha, Diana Ruiz and Jorge Hinojos went to Pockets on September 25, 2015 in Rocha's car and they arrived there at around 12:30 a.m. (pg. 147).

There were no problems at Pockets while Rocha was there. (pg. 148).

The group with whom Rocha associated was made up of Diana Ruiz, Jorge Hinojos, David Torres, Carlos and Chrystyan. (pg. 150). The group left at 2:00 a.m.

Carolina Rocha noticed that some of the men in her group "... drank beers that they had in their trunk." While Rocha was walking to her car she was texting "... I was texting on my phone" and that she was "... distracted on the phone." (pg. 154).

Rocha saw the lights from what turned out to be Lozano's truck and that she was "... scared, because I saw the light that was very close to me. **But once it**

**stopped, well , nothing happened so I calmed down. And I continued walking.”** (pg. 155).

When Carolina Rocha continued behind Lozano’s truck to her vehicle Lozano rolled down the driver’s side window but Lozano did not say anything to Rocha. (pg. 155).

Once Carolina Rocha was on the driver’s side of Lozano’s truck she was unable to see what was occurring on the passenger side of the truck. (pg. 157).

At that point carolina Rocha saw Jorge Hinojos come to the driver’s side of the Lozano’s truck with Diana Ruiz behind him. Rocha noticed that Hinojos was angry. Rocha’s reaction was to approach the truck. (pg. 157).

Rocha saw Hinojos throw a punch “... towards the inside of the truck.” (pg. 157).

**Rocha and Ruiz tried to hold Hinojos back from the truck but were unable to do so as the boys on the passenger side yelled something.** (pg. 157 and 158).

Carolina Rocha saw the pistol when Lozano “... put it on the edge where the window is, and he [Lozano] shot.” At that point Rocha ran towards the back of the truck. (pg. 158).

After the shots the truck left right away. (pg. 158).

**Coroner Mario Rascon's testimony starting at (RR Vol. 8 pg. 8).**

Lozano shot Hinijos three times. (pg. 11).

The coroner testified that one of the wounds was 2 ½ inches right of chest midline and 13 ½ inches below the top of the head – that it was non fatal. (pg. 14 , 15).

Another wound was on the upper left arm – that it was non fatal. (pg. 15, 16).

Another wound was near the left arm pit and traversed the body from left to right – that wound was fatal. (pg. 16, 17).

There was no determination as to the distance from the point of the pistol to Hinojos when he was shot. (pg. 28).

The post mortem toxicology done on Hinojos disclosed Cocain and alcohol in Jorge Hinojo's system. (pg. 19).

## **SUMMARY OF ARGUMENTS**

I. THE TRIAL COURT GAVE THE JURY INCORRECT  
INSTRUCTIONS RESULTING IN EGREGIOUS HARM TO LOZANO.

## **ARGUMENTS AND AUTHORITIES**

### **I. THE TRIAL COURT GAVE THE JURY INCORRECT INSTRUCTIONS RESULTING IN EGREGIOUS HARM TO LOZANO.**

#### **A. Standard of Review:**

Texas Rule of Evidence 103 (e) permits the Court to “... take notice of a fundamental error effecting a substantial right, even if the claim was not properly preserved.”

#### **B. Chronological Sequence of Events**

As the chronological recitation of facts from the State’s only three eye witnesses clearly points out:

1. Nothing of significance happened when the parties were inside of Pockets pool hall from around 12:00 p.m. to 2:00 a.m.
2. As the parties were leaving at around 2:00 a.m. Lozano startled Carolina Rocha while driving his truck in the parking lot – Rocha was startled by the lights on Lozano’s truck. At the time Carolina Rocha was startled she was making her way to her car while preoccupied texting on her phone.
3. Lozano stopped his truck and lowered the passenger side window and looked at the girls – Diana Ruiz and Carolina Rocha.
4. Carolina Rocha continued walking behind Lozano’s truck to her vehicle.

5. Jorge Hinojos became angry that Lozano was looking at his girlfriend, Diana Ruiz.

6. David Torres told Lozano to leave because there were four men there – Jorge Hinojos, David Torres, Carlos and Chrystyan.

7. While Torres was thus engaging Lozano – Jorge Hinojos threw a beer can that “**exploded**” in Lozano’s truck.

8. Lozano reached for a back pack and retrieved a pistol **after the beer can was thrown into his truck and exploded inside** and pointed it at David Torres who was still on the passenger side of Lozano’s truck. (RR Vol. 7 pg. 114). David Torres shouted that Lozano had a gun and challenged Lozano to use it.

9. As Lozano retrieved his back pack Jorge Hinojos, apparently unaware of what Lozano was doing, ran behind Lozano’s truck with Diana Ruiz behind him.

10. Lozano brandished the pistol towards Torres and Torres spoke to Lozano: “Hey, what are you going to do with that? You better leave. Don’t scare me with that gun.” (RR Vol. 7 pg. 114).

11. As David Torres was speaking to Lozano – Jorge Hinojos went to the open driver’s side window and began punching Lozano as Diana Ruiz tried to pull Hinojos away and as Carolina Rocha approached the scene to help Ruiz pull Hinojos away from punching Lozano.

12. It is at that point that Lozano “**turned around**” towards Hinojos and fired three shots at Hinojos.

There is really no conflict in the testimony of the three eye witnesses – each version dovetails into the other.

**Lozano did not have to take the stand... the testimony of the State’s three eye witnesses was sufficient for the trial court to find that there was sufficient prima facie evidence that Lozano acted in self defense and for the trial court issue the jury instructions on self defense – and the State agreed.**

### C. Argument

What are jury instructions? Why do they exist?

Jury instructions are legal rules and definitions of procedure and definitions of conduct and the parameters of that conduct that jurors are sworn to follow and abide by when deciding a case.

Jury instructions are one of the first things a lawyer turns to when researching the elements of a crime.

Jury instructions are so important that they must be approved by the highest courts in jurisdictions.

In this case the State puts forth the novel argument that it doesn’t matter that the trial court gave the jury the wrong self defense instructions because the self



defense instructions should have never been given.

If that were the case... then the problem with the given instructions becomes that the instructions sent the jury on an incorrect factual and legal wild goose chase... thus compounding the error and the egregious harm.

We respectfully submit that no court can justify finding that wrong jury instructions are okay on the basis that the correct instruction should not have been given in the first place...

The State's argument is sort of analogous to a doctor justifying the amputation of the wrong limb because the original sick limb had not required amputation after all.

Specially when the State did not object to the wrong instructions at trial.

Specially when the State pushed for the wrong self defense instructions to go to the jury – perhaps anticipating an easier conviction under the wrong jury instructions.

Specially when the State opened the door to the issue of self defense as early as the voir dire process.

On RR Vol. 6, pg. 61, lines 13 to 16 a venire panel member asks the State about self defense. The State responds: “We’re going to talk about self-defense in just a second.”

A few seconds later the States launches into a twenty pages of transcript voir dire on the issue of self defense. See RR Vol. 6, pgs. 74 through 94.

The State hammers on the issue of self defense during voir dire – even before any evidence was presented.

In those pages we see the defense object several times on the basis of “contracting” and on the basis of a misstatement of the law of self defense. Objections are sustained but the State finds its way back to the line of dialog with the venire panel.

The State continuously pounds on the reasonable reason not to retreat when attacked standard even after sustained objections.

And now the State is asking this Honorable Court to ignore that State conduct at trial... when it was the State that first raised the issue of self defense and then proceeded to hammer the wrong standard by which to measure the issue?

And when it was the State that profited from that conduct by getting a conviction with the wrong jury instructions?

And most importantly... at the trial, the State agreed that, in spite of not having taken the stand, the Defendant had made a prima facie showing that he was entitled to the self defense instructions.

On RR Vol. 9 pg. 91 lines 23-25 and continued on pg. 92 lines 1-4... When

Lozano moved for a directed verdict on the grounds that Lozano had acted in self defense, the State answered:

**“ .... We have proven all of the elements in the indictment, and as far as self-defense, I think there is definitely an issue as to whether it was reasonable and if it was immediately necessary. Your Honor, and so we disagree with his premise that it's settled, and I think its up to the jury.”**

And so at trial the State argued that the issue of self defense should be put to the jury... but now the State wants to back track and claims that the issue of self defense should not have gone to the jury... because in retrospect it was discovered the jury instructions given were a misstatement of the law current at the time.

**The State's current argument that Lozano failed to take the stand to make a prima facie case for self defense ignores the fact that in response to defendant's motion for a directed verdict... the State agreed that the issue of self defense should be put to the jury – thus obviating the need for Lozano to take the stand.**

Because of the State's verbal and implicit stipulation that a prima facie case sufficient to go to the jury had been made there was no need for Lozano to take the stand. What for? The State had already agreed that a prima facie case for self

defense had been made!

At trial the State objected to Lozano's motion for directed verdict on the issue of self defense and asked the trial court to let the issue of self defense go to the jury!

And now the State claims the issue of self defense should have never gone to the jury?

Apparently even the State thought that the testimony of the State's witnesses was sufficient to make a prima facie case to show that Lozano was acting in self defense. And, in spite of the State's current and novel claim, it was sufficient! See *Torres v. State*, 117 S.W. 3d 891 (Tex. Crim. App.2003)

"Specific acts of violence may be introduced to demonstrate the reasonableness of the defendant's fear of danger or to demonstrate that the deceased was the first aggressor."

On RR Vol. 10 pg. 26, lines 12 through 19 we see the State at closing argument making reference to the notion that a person had a duty to retreat before resorting to deadly force.

"... or that a person in his [referring to Lozano] situation at that place and time would have **retreated** – okay, **because if you find he could have retreated before using deadly force, he is not entitled to it** [the defense of self defense]..."

The State doesn't even bother with the old "reasonable person" standard language.

The fact is that the State's own witnesses supplied the necessary testimonial evidence for a prima facie case of self defense when testifying about Hinojos' conduct before the shooting – that Hinojos was the first aggressor intent on causing Lozano serious bodily injury first by throwing a full can of beer at Lozano that exploded inside of Lozano's truck and then by running behind Lozano's truck and attacking Lozano with his fists to the back of the head by surprise while Lozano was focused on the threatening group still by the passenger side...

Imagine if someone threw an exploding beer can at you that missed and then while his companions kept you distracted sneaked around behind and started punching you from behind.

It bespeaks a coordinated attack by a group of experienced predators and also justifies reasonable fear of serious bodily injury based on disparity of numbers.

The prima facie case of reasonable fear of serious bodily injury or death by Lozano based on the totality of the circumstances was clearly there.

And... the State agreed that it should go to the jury – the State wanted it to go to the jury because the State had been pushing the duty to retreat theory

throughout the trial and closing argument.

The State put all of its eggs in the wrong basket – and now wants this Honorable Court to bail it out. Respectfully, that’s not what this Court is for.

The Texas Penal Code was amended to include self defense § 9.31 and § 9.32 on September 1, 2017 – the stand your ground laws.

The only post September 1, 2017 published case cited by the State is *Shaw v. State*, 243 S. W. 3d 647 (Tex. Crim. App. 2007) That is not even a self defense case – the issue there is a “Good Samaritan” jury instruction. Nothing to do with self defense!

Yet even under the pre September 1, 2007 change in the law of self defense Lozano would have been entitled to a self defense instruction. So much so, that the State argued for it at trial.

Now the State argues that the position it took at trial should be ignored.

The same State argument has been already rejected on appeal in a twenty-five page well thought out opinion of the Eighth District Court of Appeals.

And in spite of its numerous citations here... no new reason dealing with post September 1, 2007 law is offered by the State to disturb the Eighth District Court of Appeals decision.

In *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App., 2000) the Court stated:

“... However, pursuant to Texas Rule of Evidence 103(d), we are authorized to take notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court. As we have previously stated, "Some rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system. A principle characteristic of these rights is that they cannot be forfeited. That is to say, they are not extinguished by inaction alone...”

And although *Blue* is a case about a Judge’s comments to a jury the language in the Court’s decision is directed at the effect of the of an egregious error on a “substantial right” as declared in Rule 103 (e).

Jury instruction XIII (CR Vol 2, pg 789) is an incorrect statement of the law and it egregiously effected Lozano’s substantial right to a fair trial.

Similarly, jury instruction XIV (CR Vol 2, pg 790) is an incorrect statement of the law that also egregiously effected Lozano’s substantial right to a fair trial.

The nature of the fundamental error in both of the instructions is that it creates a requirement that the jury must find that Lozano **reasonably did not retreat** before the jury could consider whether he acted in self defense.

This placed a duty of retreat upon Lozano that did not exist in the law after

September 1, 2017 and that was specifically negated by Texas Penal Code § 9.31 (f) – which states: **“For purposes of Subsection (a), in determining whether an actor described by Subsection (e) reasonably believed that the use of force was necessary, a finder of fact may not consider whether the actor failed to retreat.”**

This is the famous “stand your ground law” that did away with the requirement that a defendant show that he or she tried to retreat before resorting to deadly force.

The instructions given at trial contradicted existing law and placed upon on Lozano’s claim of self defense a non existing and egregious burden of proof – that he prove up the reasonableness of his failure to retreat.

That non existent burden clearly effected Lozano’s substantial right to a fair trial and caused him egregious harm.

Imagine a conviction for burglary based on trespassing jury instructions.

Convicting a defendant pursuant to a jury instruction made obsolete by a new law is similar, if not exactly the same, as convicting a defendant under an ex post facto law. Lozano was convicted on an ex post facto jury instruction.

We respectfully submit that the State has not made a compelling case for its claim that the instructions should not have been given in the first place, and most



importantly... the State has not even addressed the issue upon which this matter was remanded by the Court below – that you can't convict a defendant on the wrong jury instructions and that it is an egregious error to do so.

Lozano deserves a fair trial under the laws as they existed at the time.

**PRAYER FOR RELIEF**

**Wherefore**, based on the foregoing Defendant/Appellant, Carlos Lozano, prays this Honorable Court affirm the decision Court of Criminal Appeals 8th District to remand this case for retrial.

Respectfully submitted,

/s/ Ken del Valle

Kenneth del Valle

1062 Whirlaway Drive

El Paso, Texas 79936

Tel: (915) 276-8353

Texas Bar No.24010960

### CERTIFICATE OF SERVICE

I, Kenneth del Valle, an attorney, do hereby certify that on August 16, 2020 I caused to be filed the above document through the Texas E File system that will notify all parties entitled to service and notice of filing. And that I served a copy upon Mr. Carlos Lozano, No. 02156992 Texas Department of Corrections, 12071 FM 3522, Abilene, Texas 79601 by U.S. mail.

/s/ Ken del Valle  
Kenneth del Valle

### CERTIFICATE OF COMPLIANCE

This brief complies with the type and volume limitation of Tex. R. App. P. 9.4 (I) (1) (B) because this brief contains less than 15,000 words excluding the parts of the brief exempted by Tex. R. App. P. 9.4 (i) (1). Pursuant to Tex. R. App. P. 9.4 (i) (3) this brief contains 5,508 words.

/s/ Ken del Valle  
Kenneth del Valle

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kendelvalle@aol.com  
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Kenneth del Valle		kendelvalle@aol.com	8/17/2020 12:55:23 AM	SENT

#### **Case Contacts**

<b>Name</b>	<b>BarNumber</b>	<b>Email</b>	<b>TimestampSubmitted</b>	<b>Status</b>
State Prosecuting Attorney		information@SPA.texas.gov	8/17/2020 12:55:23 AM	SENT
Ronald Banjeri		rbanerji@epcounty.com	8/17/2020 12:55:23 AM	SENT